IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

PAMELA HERRINGTON,
individually and on behalf of all
others similarly situated,

OPINION and ORDER

Plaintiff,

11-cv-779-bbc

v.

WATERSTONE MORTGAGE CORPORATION,

Defendant.

- -

After plaintiff Pamela Herrington filed this labor dispute, defendant Waterstone Mortgage Corporation filed a motion to dismiss or stay the case on the ground that plaintiff's claims are subject to an arbitration agreement. I agreed and closed the case administratively while plaintiff submitted her claims to the arbitrator. Now defendant seeks to reopen the case so that it can challenge two preliminary orders of the arbitrator, one in which he concluded that the arbitration agreement permits class arbitration and another in which he sought to prevent misinformation and coercive tactics by limiting defendant's communication about this case with potential class members.

I am denying the motion to reopen because defendant's challenges are premature. Defendant is seeking review under 9 U.S.C. § 10(a)(4), but that provision is about "awards," not preliminary procedural orders. In any event, even if defendant's petitions were timely,

I would deny them. Defendant seems to assume in its briefs that it is entitled to de novo review of the arbitrator's decision because the focus of its arguments is that the arbitrator misinterpreted the arbitration agreement and failed to follow relevant case law. These arguments are doomed from the start because it is well established that legal and factual errors are not grounds for vacating an award. Defendant does not even try to show that the arbitrator violated § 10(a)(4) by "exceed[ing] [his] powers" as the Court of Appeals for the Seventh Circuit has defined that term.

Both the timing of defendant's motions and the substance of its arguments about the arbitrator's orders suggest that it does not understand the fundamental purposes of arbitration agreements, which are "to resolve a dispute in less time, at less expense, and with less rancor than litigating in the courts." Publicis Communications v. True North Communications, Inc., 206 F.3d 725, 727 (7th Cir. 2000). As the court of appeals has recognized on multiple occasions, these purposes are thwarted when a party attempts to relitigate issues decided by the arbitrator or challenges the arbitrator's orders in piecemeal fashion. United Food & Commercial Workers, Local 1546 v. Illinois American Water Co., 569 F.3d 750, 757 (7th Cir. 2009); Edstrom Industries, Inc. v. Companion Life Insurance Co., 516 F.3d 546, 552 (7th Cir. 2008); Prostyakov v. Masco Corp., 513 F.3d 716, 723 (7th Cir. 2008); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 579 (7th Cir. 2001).

Particularly because it was defendant that sought to enforce the arbitration agreement, its immediate and repeated attempts to obtain court intervention in the arbitration process are both ironic and improper. I directed the parties to arbitration

because that is how they agreed to resolve their dispute, not to make the proceedings even more contentious and expensive. Accordingly, I anticipate that defendant will use better judgment in the future in deciding whether and when to invoke § 10(a)(4).

OPINION

A. Class Arbitration

1. Availability of review

A preliminary question is whether defendant's challenge to the arbitrator's decision on class arbitration is premature. Defendant's petition for review relies on 9 U.S.C. § 10(a)(4), which permits a federal district court to vacate an arbitration "award" if "the arbitrato[r] exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." In an order dated November 5, 2012, dkt. #69, I questioned whether the class arbitration decision was sufficiently final to qualify as an award and I directed the parties to brief the issue. In its response, defendant makes several arguments.

a. Hardship

Defendant says that it will suffer a hardship if it cannot challenge the decision until the arbitration is finished. That argument is undermined somewhat because the arbitrator has not yet decided whether to allow the arbitration to proceed as a class. He has concluded only that the arbitration agreement permits class arbitration. Thus, it remains uncertain

whether defendant will be forced to defend against a class arbitration, which might be reason alone to conclude that defendant's challenge is premature. Dealer Computer Services, Inc. v. Dub Herring Ford, 547 F.3d 558 (6th Cir. 2008) (arbitration panel's preliminary ruling that contract did not bar class proceedings was not ripe for review); Corinthian Colleges, Inc. v. McCague, No. 09 C 4899, 2010 WL 918074, *3 (N.D. Ill. Mar. 4, 2010) (same).

Even if I accept defendant's premise that it needs immediate review to avoid a significant litigation burden, defendant fails to explain why any hardship it will suffer makes the arbitrator's decision an "award" within the meaning of § 10(a)(4). The Supreme Court rejected a similar hardship argument in concluding that orders on class certification by district courts are not final orders subject to immediate appeal under 28 U.S.C. § 1291. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469-70 (1978). (The Federal Rules of Civil Procedure were later amended to give the courts of appeals discretion to allow interlocutory review of class certification decisions, Fed. R. Civ. P. 23(f), but defendant points to no similar provision governing § 10.) Although defendant cites two cases in which the court relied on a hardship rationale to conclude that a party could take an immediate appeal of a decision about class arbitration, Genus Credit Management Corp. v. Jones, CIV. JFM-05-3028, 2006 WL 905936 (D. Md. Apr. 6, 2006); West County Motor Co. v. Talley, 4:10CV01698 AGF, 2011 WL 4478826 (E.D. Mo. Sept. 27, 2011), in neither case did the court identify a statutory basis for its conclusion.

b. Stolt-Nielsen

Defendant "heavily relies" on Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), which involved an interlocutory review of an arbitrator's decision to permit class arbitration. Dft.'s Br., dkt. #70, at 4. The Court rejected the argument that the dispute was constitutionally unripe, reasoning that "[t]he arbitration panel's award means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis. Should petitioners refuse to proceed with what they maintain is essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under 9 U.S.C. § 4." Id. at 1767 n.2 (citations omitted). In addition, the Court concluded that the respondent had waived any argument that the dispute was prudentially unripe by failing to raise the issue in the lower courts. Id.

Stolt-Nielsen provides limited guidance. The Court did not consider the question whether the decision was sufficiently final to qualify as an "award" under 9 U.S.C. § 10(a), but only whether the Constitution prohibited review. Because the Court found that any other issue of ripeness was waived, it would be improper to interpret the case as holding that decisions on class arbitration are appealable as a general matter. Accordingly, I conclude that defendant's reliance on Stolt-Nielsen is misplaced.

c. Circuit law

Defendant cites Smart v. International Brotherhood of Electrical Workers, Local 702, 315 F.3d 721, 725 (7th Cir. 2002), Publicis Communications v. True North Communications, Inc., 206 F.3d 725 (7th Cir. 2000), and Yasuda Fire & Marine Insurance Company of Europe v. Continental Casualty Company, 37 F.3d 345 (7th Cir. 1994), as examples of cases in which the Court of Appeals for the Seventh Circuit has found an arbitrator's decision to be appealable even though the arbitration was not finished. These cases provide some support to defendant's position, but they are not directly on point. Smart involved a decision on liability that left damages unresolved because the parties had not sought to arbitrate that issue; Publicis involved a decision that resolved a particular claim, but left unresolved other, unrelated claims; Yasuda involved a decision to require a party to post an interim letter of credit that was necessary to protect a potential final award.

In each of these cases, the arbitrator had granted relief related to the substance of the plaintiff's claims. Smart and Publicis were decisions on the merits. Although Yasuda was not a final award, it was inextricably linked to one. Defendant does not cite any cases from this circuit permitting an immediate appeal of a decision regarding class arbitration or any other procedural issue that was distinct from the claims.

Further, the court of appeals has acknowledged that a general test for determining the appealability of an arbitration decision remains elusive. In Smart, 315 F.3d at 725-26, the court rejected a view that the final judgment rule of 28 U.S.C. § 1291 should be applied to arbitration decisions, but it acknowledged that "courts are naturally reluctant to invite a

judicial proceeding every time the arbitrator sneezes." The court declined to provide more specific guidance, stating that "generalization is difficult." Id. at 725. Thus, I am reluctant to infer a general rule from Yasuda, Publicis and Smart that district courts may review any decision of an arbitrator that one party views as urgent.

Defendant argues that Publicis supports a rule that "discrete" and "time sensitive" issues are appealable immediately, but the relevant passage from Publicis, 206 F.3d at 729, states that "[a] ruling on a discrete, time-sensitive issue may be final and ripe for confirmation even though other claims remain to be addressed by arbitrators." Even if I assume that the court was providing a general rule, the court's reference to "other claims" would not necessarily extend to procedural orders. Id. at 729 (noting that appealed issue "wasn't just some procedural matter—it was the very issue True North wanted arbitrated"). See also Dealer Computer Services, Inc. v. Dub Herring Ford, 623 F.3d 348, 352 (6th Cir. 2010) ("[T]he interim class arbitration determination, albeit a significant procedural step in the arbitration proceedings, has no impact on the parties' substantive rights or the merits of any claim. The denial of class arbitration proceedings arguably disposes of a discrete, independent, severable issue, but it is a procedural issue—hardly the sort of final decision that warrants immediate judicial review in disruption of ongoing arbitration proceedings.").

Neither party cites Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635 (7th Cir. 2011), which is surprising in light of the similarity of the issues in that case. In particular, the court rejected as premature a request from the defendant to determine whether an arbitration proceeding could be consolidated with other arbitration

proceedings:

> If a party could run to court and contest every procedural ruling that it believes is erroneous and not squarely covered by the contract (which rarely tells arbitrators what procedures to use), arbitration would fail to offer an attractive alternative to litigation. Litigation usually entails only one proceeding in the district court, followed by one appeal. If BCS were right, however, every arbitration could be contested (with an appeal) before it begins; every supposed procedural error could be contested in a separate suit (with another appeal) in mid-arbitration; and then the outcome could be contested in a proceeding to confirm or vacate the award, with yet another appeal. That would make arbitration both interminable and impossibly expensive.

Id. at 638.

Obviously, Blue Cross Blue Shield cuts in the other direction from Yasuda, Publicis and Smart. Particularly because the issue whether arbitration proceedings may be consolidated is similar to the issue whether class arbitration is appropriate, Blue Cross Blue Shield seems on point.

The actual holding of Blue Cross Blue Shield was limited to the question whether a party was "entitled to a peremptory order that would take the question out of the arbitrators' hands." Id. at 640. The court did not decide that a party must wait until the arbitration is finished to appeal any and all procedural decisions or even that the parties in that case must wait until the arbitration was finished to appeal a decision about consolidation of proceedings. Rather, the court held only that the arbitrator must have the first opportunity to address the issue.

Although Blue Cross Blue Shield is not controlling, it supports a distinction between substantive and procedural orders. This makes sense in the context of a statute authorizing

review of an "award," which ordinarily would be associated with a decision on the merits rather than a matter of procedure.

d. Arbitrator's intent

Finally, defendant points out that the arbitrator called his decision a "Partial Final Award on Clause Construction" and stayed the case so that defendant could appeal the decision, a practice that is authorized by the rules of the American Arbitration Association. Defendant cites Publicis, 206 F.3d at 729, for the proposition that "the Arbitrator's understanding of finality is a factor in determining whether" the decision is reviewable. Again, however, Publicis is not directly on point because, in that case, the arbitrator had "explicitly carved out [a particular claim] for immediate action from the bulk of the matters still pending," id., similarly to the way a district court would make a claim immediately appealable under Fed. R. Civ. P. 54(b). The court of appeals did not say that an arbitrator has the authority to make any decision appealable by calling it an "award," regardless whether the decision is substantive or procedural. In fact, the court stated that "courts go beyond a document's heading and delve into its substance and impact to determine whether the decision" can be appealed immediately. Publicis, 206 F.3d at 729. Cf. Blue Cross Blue Shield, 671 F.3d at 638 ("[T]he meaning of a word depends on what it denotes to members of the appropriate linguistic community, not on idiosyncratic usages that people may be able to devise. Meaning is objective and external to the speaker.") (citations omitted). Defendant also quotes the statement from Smart, 315 F.3d at 725, that "an award is final and

appealable" if "the arbitrator himself thinks he's through with the case," but that statement does not support defendant's position because it is undisputed that the arbitrator is *not* "through with the case." Thus, I cannot rely solely on the arbitrator's intent or the name he gave his decision.

Although I acknowledge that there are plausible arguments in favor of both sides of this issue, in my view, circuit law points toward a general rule that an arbitrator's decision is not an "award" under § 10(a)(4) unless the decision grants substantive relief of some kind. Because an order on class arbitration is not substantive relief, I conclude that it is not immediately appealable.

2. Merits

Even if I assumed defendant's challenge is timely, defendant could not prevail. "The grounds for overturning an arbitration award are extremely limited." Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008). See also Stolt-Nielsen, 130 S. Ct. at 1767-68 (party challenging arbitration award "must clear a high hurdle"). In fact, the court of appeals has stated that it is incorrect to refer to a court's role under § 10(a) as "judicial review":

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract.

Wise v. Wachovia Securities, LLC, 450 F.3d 265, 269 (7th Cir. 2006).

In this case, defendant argues that the arbitrator's decision should be overturned because it is "in manifest disregard of the law," Dft.'s Br., dkt. #61, at 6, citing cases such as Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992), in which the court relied on cases from other circuits to conclude that an arbitration award must be vacated if the arbitrators "deliberately disregarded what they knew to be the law in order to reach the result they did." See also National Wrecking Co. v. International Brotherhood of Teamsters, Local 731, 990 F.2d 957, 961 (7th Cir. 1993) ("When arbitrators demonstrate a manifest disregard for the applicable law, courts will not enforce the award."). However, defendant's reliance on these cases is misplaced because they are no longer good law.

Both before and after Health Services Management and National Wrecking, the court of appeals has held that "manifest disregard of the law" is not a ground for vacating an arbitration award because it is not listed in § 10(a). E.g., IDS Life Ins. Co. v. Royal Alliance Associates, Inc., 266 F.3d 645, 650 (7th Cir. 2001); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001); Flender Corp. v. Techna-Quip Co., 953 F.2d 273, 279 (7th Cir. 1992); Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991); Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 268 (7th Cir. 1988). In Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994), the court provided a thorough explanation for rejecting the "manifest disregard" standard:

> The formula is dictum, as no one has found a case where, had it not been intoned, the result would have been different. It originated in Wilko v. Swan,

> 346 U.S. 427, 436-37 (1953)—a case the Supreme Court first criticized for its mistrust of arbitration and confined to its narrowest possible holding, and then overruled. Created ex nihilo to be a nonstatutory ground for setting aside arbitral awards, the Wilko formula reflects precisely that mistrust of arbitration for which the Court [has] criticized Wilko. We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators 'exceeded their powers'—it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that Wilko is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation. So it will be enough in this case to consider whether the arbitrators exceeded their powers.

Id. at 706.

Although the court has wavered again from time to time, e.g., Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 366 (7th Cir. 1999), the court's most recent pronouncement on this issue is the same as its first: "This list [of grounds for vacating an award under § 10] is exclusive; neither judges nor contracting parties can expand it." Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., 660 F.3d 281, 284 (7th Cir. 2011). Because "[d]isregard of the law is not on the statutory list," courts may not rely on it to vacate an award, unless it overlaps with a ground that *is* on the list, such as the "arbitrato[r] exceeded [his] powers." Id. The court stated that any other decisions suggesting a "different or broader" standard did not "surviv[e]" Hall St. Associates, LLC v. Mattel, Inc., 552 U.S. 576, 583-84 (2008), in which the Supreme Court concluded that 9 U.S.C. §§ 10 and 11 "provide the FAA's exclusive grounds for expedited vacatur and modification."

The court of appeals has made it clear in numerous decisions that the arbitrator does not exceed his powers simply because he is wrong, on the law or facts, even plainly so. Hill v. Norfolk & Western Railway, 814 F.2d 1192, 1194-95 (7th Cir.1987) ("[T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract."). See also Trustmark Ins. Co. v. John Hancock Life Insurance Co. (U.S.A.), 631 F.3d 869, 874-75 (7th Cir. 2011) ("[A]mong the powers of an arbitrator is the power to interpret the written word, and this implies the power to err; an award need not be correct to be enforceable."); Butler Manufacturing Co. v. United Steelworkers of America, AFL-CIO-CLC, 336 F.3d 629, 636 (7th Cir. 2003) ("That the arbitrator in this case may have misunderstood the FMLA is simply not relevant."); BEM I, LLC v. Anthropologie, Inc., 301 F.3d 548, 554-55 (7th Cir. 2002) ("[T]here is no judicial review of arbitration awards for legal error."); George Watts & Son, 248 F.3d at 579 ("If manifest legal errors justified upsetting an arbitrator's decision, then the relation between judges and arbitrators established by [the Supreme Court] would break down.").

The reason for that rule is straightforward: when the parties agreed to arbitrate, they agreed to allow the arbitrator to decide their case rather than the court. Thus, a party is not entitled to overturn an award unless it shows that arbitrator disregarded the arbitration agreement itself. United Food & Commercial Workers, Local 1546 v. Illinois America Water Co., 569 F.3d 750, 754-55 (7th Cir. 2009) ("[O]nce we conclude that the arbitrator

did in fact interpret the contract, our review is concluded."); Wise, 450 F.3d at 269 ("[T]he issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all."); Tice v. American Airlines, Inc., 373 F.3d 851, 854 (7th Cir. 2004) ("[A] federal court is not authorized to set aside the arbitrator's award so long as the arbitrator interpreted the parties' contract."); American Postal Workers Union, AFL-CIO, Milwaukee Local v. Runyon, 185 F.3d 832, 835 (7th Cir. 1999) ("[O]ur task is limited to determining whether the arbitrator abided by the contractual limits placed on him to decide the dispute."). Any other rule "would prevent the parties from achieving the principal objectives of arbitration: swift, inexpensive, and conclusive resolution of disputes." George Watts & Son, 248 F.3d at 579.

The court of appeals has identified only two instances in which a legal error could also be an example of an arbitrator exceeding his authority: (1) the arbitrator refused to apply the body of law required by the arbitration agreement (for example, by refusing to apply a choice of law provision); and (2) the arbitrator required the parties to do something they could "not do through an express contract" (for example, by paying employees less than the minimum wage). Affymax, 660 F.3d 281, 285 (7th Cir. 2011); Halim, 516 F.3d at 564; Edstrom, 516 F.3d at 552; George Watts & Son, 248 F.3d at 578-79.

With this understanding of the standard, it is clear that the arbitrator did not exceed his powers in deciding that the arbitration agreement "permits this arbitration to proceed on behalf of a class." Dkt. #61-1 at 9. In his decision, the arbitrator stated, "[w]hether a class arbitration is permitted in a particular case is a matter for the arbitrator to determine

by construing the parties' arbitration agreement." Id. at 6. He cited Stolt-Nielsen for the proposition that there must be "a contractual basis" for proceeding on a class basis. Id. at 7. He then cited § 13 of the agreement, which states that disputes would be "resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employments." Id. Those rules include rules for class arbitrations, which "shall apply to any dispute arising out of an agreement that provides arbitration pursuant to any of the rules of the American Arbitration Association ('AAA') where a party submits a dispute to arbitration on behalf of or against a class or purported class." Id. Because plaintiff's complaint was brought "on behalf of others similarly situated," the class arbitration procedures applied.

The arbitrator acknowledged what he referred to as "the waiver clause": "Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement." Id. at 8. However, the arbitrator concluded that he could not apply that provision because this court had invalidated it under the National Labor Relations Act and had held that plaintiff "must be allowed to join other employees to her case." Id. Even if he considered the waiver, the agreement was ambiguous in light of the provision that arbitration should proceed in accordance with AAA rules and that ambiguity must be construed against defendant, the drafter of the agreement. Id.

The arbitrator interpreted the arbitration agreement and applied the law, which is all he was required to do. United Food & Commercial Workers, 569 F.3d at 755 ("[T]he arbitrator confronted a situation that was not expressly contemplated by the parties,

interpreted the agreement, and reached a conclusion. In short, he provided exactly what the parties bargained for. That is enough."). Defendant argues vigorously that the arbitrator misinterpreted the agreement and Stolt-Nielsen and peppers its brief with dozens of citations to case law that it says the arbitrator violated, but all of that argument is irrelevant under the rule that courts cannot review an arbitrator's decision for legal error. United Food & Commercial Workers, 569 F.3d at 757 ("[W]e pass no judgment on the quality of that interpretation but instead defer to the arbitrator."); Butler, 336 F.3d at 636 (refusing to consider argument that arbitrator's decision should be overturned because it "grossly misapplied the FMLA"). It is telling that, out of all the cases defendant cites, none are cases in which a court overturned an arbitrator's decision under circumstances similar to those in this case.

At the end of its brief, defendant argues that the arbitrator violated the FLSA by approving "opt out" rather than "opt in" class procedures when 29 U.S.C. § 216(b) provides an opt in procedure for FLSA claims. This argument is ironic in light of the position defendant took in its motion to compel arbitration, which was that § 216(b) is not binding on parties to an arbitration agreement, a position I adopted in the March 16, 2012 order because the weight of authority supported it. Dkt. #57 at 4-5 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991); Long John Silver's Restaurants, Inc. v. Cole, 514 F.3d 345, 351 (4th Cir. 2008); Carter v. Countrywide Credit Industries, Inc., 362 F.3d 294, 298 (5th Cir. 2004); Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618, 619 (9th Cir. 2001); Copello v. Boehringer Ingelheim Pharmaceuticals Inc., 812 F. Supp.

2d 886, 894 (N.D. Ill. 2011)). Although defendant cited many of these cases in its motion to compel, it fails to explain why they should not be controlling now, so I see no reason to reach a different conclusion in this context.

B. Communication with Potential Class Members

The second order defendant has appealed relates to communications with class members and potential class members. In particular, defendant is challenging rulings by the arbitrator that prohibit defendant from disseminating a specific letter to employees about their rights related to this dispute; require the dissemination of a new letter; and require defendant to obtain permission from the arbitrator before communicating with class members about the arbitration. (The order addresses other issues as well, but these are the only issues defendant seems to be challenging. Although parts of defendant's brief suggest that the arbitrator prohibited it from amending its employment agreement, the arbitrator stated expressly in his order that he was not addressing that issue, so I do not consider it either. Dkt. #64-6 at 14, ¶ 3.) The arbitrator issued these orders after concluding that defendant's letter was misleading and coercive because it informed employees that an amendment to their employment agreement "may jeopardize any right you may have to join [plaintiff's] arbitration proceeding" and that "executing the Amendment will impact your right to potentially join [the] arbitration," but it did not explain what that meant, did not indicate whether the employees could decline to sign the amendment and did not inform them of their right to be free from retaliation for participating in the arbitration. Dkt. #64-6

at 11; Dkt. #64-4. Defendant relies again on 9 U.S.C. § 10(a)(4) as permitting the appeal.

I reach the same conclusion about this order as I did with the first one: it is an interim order not subject to appeal. It raises only another issue about procedure and case management rather than the substance of plaintiff's claims, suggesting that the order is not an "award" within the meaning of § 10(a)(4).

Defendant cites Chrysler Motors Corp. v. International Union, Allied Industry Workers of America, AFL-CIO, 909 F.2d 248, 249-50 (7th Cir. 1990), for the proposition that injunctions issued by arbitrators are immediately appealable, but that citation is disingenuous for two reasons. First, Chrysler Motors was a case about the review of nonfinal orders of a district court under 28 U.S.C. § 1292(a)(1), not review of an arbitrator's decision under § 10(a)(4). Because § 1292 gives courts of appeals authority to review preliminary injunctions immediately, cases relying on that provision provide little guidance in applying § 10(a)(4) in the district court.

Second, Chrysler Motors involved an injunction to reinstate an employee as part of the plaintiff's requested relief, not an order regarding the parties' conduct during the proceedings. Even under § 1292, "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271(1988). See also Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) ("Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not . . . 'interlocutory' within the

meaning of [§] 1292(a)(1)."); Allendale Mutual Insurance Co. v. Bull Data Systems, Inc., 32 F.3d 1175, 1178 (7th Cir. 1994) (discovery order not appealable as injunction under § 1292(a)(1)). Because the order at issue does not relate to the merits, Chrysler Motors is not instructive.

Defendant cites other cases in which courts considered immediate appeals of preliminary injunctions issued by arbitrators, but each of them involved substantive relief related to the plaintiff's claims. E.g., Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 Fed. Appx. 39, 44 (4th Cir. 2006); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1022–23 (9th Cir. 1991); Island Creek Coal Sales Co. v. Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984); Ferry Holding Corp. v. Williams, No. 4:11 MC 527 RWS, 2011 WL 5039917, *2 (E.D. Mo. Oct. 24, 2011). Defendant cites no authority for the proposition that a district court may consider an interlocutory appeal of an order like the one in this case. Further, defendant does not argue that its appeal is distinguishable from Gulfstream Aerospace and Switzerland Cheese because it is raising a First Amendment argument, so I do not consider that question. Compare United States v. Brown, 218 F.3d 415, 422 n.7 (5th Cir. 2000) ("As a case management order, the gag order at issue here was indisputably crafted to control the proceedings, in no way impacts the merits of the case against Brown, and therefore is not appealable under section 1292(a)(1).") with United States v. Ford, 830 F.2d 596, 598 (6th Cir. 1987) (gag order immediately appealable under § 1292(a)(1)).

However, even if I concluded that the arbitrator's order was ripe for consideration

under § 10(a)(4), defendant has not shown that he is entitled to relief. Defendant does not argue that the arbitrator lacked authority under the arbitration agreement to limit the parties' communication or that he ordered defendant to do something that the law would prohibit the parties from agreeing to themselves. Rather, defendant acknowledges that the arbitrator has the authority and duty "to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." Gulf Oil Company v. Bernard, 452 U.S. 89, 100 (1981). It is arguing only that the arbitrator misapplied the standard set forth in Gulf Oil and in this court in Sjoblom v. Charter Communications, LLC, 3:07-CV-0451-BBC, 2007 WL 5314916 (W.D. Wis. Dec. 26, 2007). Because the arbitrator's decisions are not subject to review for legal error, this argument is unavailing.

ORDER

IT IS ORDERED that

1. Defendant Waterstone Mortgage Corporation's motion to reopen the case, dkt. #60, is DENIED.

2. Defendant's motions to vacate certain orders of the arbitrator, dkts. ##61 and 64, are DENIED as unripe.

Entered this 3d day of December, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge